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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 515

UNITED STATES OF AMERICA, PETITIONER

v.

ADAMS PACKING ASSOCIATION, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on June 6, 1952.

OPINIONS BELOW

The order for summary judgment of the United States District Court for the Southern District of Florida, Tampa Division (R. 61), was entered without opinion. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 69) is reported at 197 F. 2d 33.

JURISDICTION

The judgment of the Court of Appeals was entered on June 6, 1952 (R. 71). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First War Powers Act and Executive Order 9001 issued pursuant thereto, *ex proprio vigore,* authorize contracting officers to waive the Government's rights by amending Government contracts without consideration.

2. Whether the standard form contract "disputes" clause, which is provided for in War Department Procurement Regulations, is a delegation of authority under the First War Powers Act to contracting officers to amend and modify contracts without consideration despite the fact that those Regulations specifically withhold such authority from contracting officers.

STATUTE, EXECUTIVE ORDER, AND CONTRACT PROVISIONS INVOLVED

Title II, Section 201, of the First War Powers Act (Act of December 18, 1941, 55 Stat. 838, 50 U.S.C. App. 611, as amended and extended to June 30, 1953, by 64 Stat. 1257 and 66 Stat. 295), the pertinent provisions of Executive Order 9001 (6 F.R. 6787), and Section 11 of the contract between respondents and the United States are set forth in Appendix A, *infra,* pp. ~~1924.~~ 19-24.

STATEMENT

This is an action brought by the United States for damages in the sum of $8,185.25, resulting from respondents' alleged breach of a contract with the

United States (R. 3-13). The facts, as revealed by the pleadings, may be summarized as follows:

In March, 1944, respondents formed an association at Winter Haven, Florida, known as the "War Labor Camp Association," for the purpose of contracting with the United States for the employment of prisoner of war labor (R. 5). Thereafter, a written contract dated May 1, 1944, was entered into between respondents and the United States wherein it was mutually agreed that for the period from April 4, 1944, to April 4, 1945, the Government would furnish to respondents the labor of prisoners of war in the custody of the War Department and that respondents would compensate the Government at the rate of fifty cents per man hour for the labor so furnished (R. 12, 14). The contract, which was authorized by, and negotiated under, the First War Powers Act, was executed by C. C. Street on behalf of respondents, and by Lt. William H. Grafft, Commanding Officer of the Prisoner of War Side Camp, Winter Haven, Florida, as Contracting Officer for the United States (R. 14, 19).

Contrary to the terms of this contract, respondents paid the Government at the rate of thirty-seven and one-half cents per hour during the period from April 4, 1944, to June 15, 1944 (R. 12, 54). Upon the refusal of respondents to pay the Government the difference between the contract rate and the rate actually paid, the present suit was instituted (R. 13).

In their answer, respondents denied all the material facts set forth above, which were contained

in the complaint (R. 3). By way of separate defense, however, respondents averred that (R. 49):

> * * * Lt. William H. Grafft, the contracting officer representing the plaintiff, had full authority under the terms of the contract and under the provisions of Public Law 354, 77th Congress [First War Powers Act], and executive Order 9001, to make and allow deductions of the rates paid for the use of prisoners of war due to labor inefficiency; that, the said Lt. Grafft, shortly after the formation of the contract between the plaintiff and War Labor Camp Association, by virtue of his aforesaid authority allowed a twenty-five per cent. inefficiency deduction of prisoners of war furnished by the plaintiff to the defendant making the hourly rate per man 37½ instead of 50¢ called for in the contract; that the defendants in good faith accepted the said inefficiency allowance and paid to the plaintiff the rate of 37½¢ per man hour on all prisoners of war furnished by the plaintiff to the defendants, and therefore, is not indebted to the plaintiff in the amount so claimed.

After filing their answer, respondents moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (R. 51). Annexed to the motion were affidavits executed by C. C. Street (R. 53), R. C. Lewis (R. 57), and Lt. William H. Grafft (R. 60). In substance, the affidavits repeated the allegations of the separate defense set forth in the answer. In particular, the affidavit of Lt. Grafft recited that the supplemental agreement

reducing the hourly wage rate to thirty-seven and one-half cents "was entered into pursuant to and by virtue of his authority as Commanding Officer of the Camp, and contracting officer for the United States" (R. 60-61).

After a hearing, the district court found that there was no genuine issue as to any material fact in that it was uncontroverted that Lt. Grafft and respondents had agreed to a reduction of the hourly rate to thirty-seven and one-half cents because of the inefficiency of the prisoner of war labor, that respondents had been billed accordingly, and that they had made payment at the rate thus charged. Concluding that, "as a matter of law, the said William H. Grafft [was] authorized by virtue of Public Law 354, 77th Congress [First War Powers Act], and Executive Order No. 9001, issued pursuant thereto, to make such an inefficiency allowance" (R. 62), the district court dismissed the action with prejudice (R. 62).

On appeal, the court below, Judge Borah dissenting, affirmed (R. 71). The court noted that the contract was entered into pursuant to the First War Powers Act, and that Executive Order 9001 authorized the War Department to enter into contracts, and amendments and modifications thereof. The Executive Order, the court stated, "expressly provides that the authority thereby conferred could be exercised by the several departments of government, or in their discretion and by their direction, 'by any officer, officers, or civil officials thereof.' Thus the authority to act in such mat-

ters as this was conferred upon contracting officers as such, and not upon any specifically designated office or officer, although, of course, a subordinate who acted might be accountable to his superior as a matter of departmental administration" (R. 70). Continuing, the court stated that this dispute was settled by mutual agreement between the respondents and the contracting officer, that under the standard form "disputes" clause of the contract his decision became final unless appealed within the time allowed, and that there was no provision making the contracting officer's decision contingent upon approval by his superiors (R. 70-71). In conclusion, the court held that, since Lt. Grafft had authority to enter into the original contract, "we see no reason why he could not subsequently modify it, pursuant to the same authority, and in accordance with the provisions of the contract itself, the benefits of which the United States has accepted" (R. 71).

REASONS FOR GRANTING THE WRIT

Conflicting squarely with the explicit holding of the Court of Claims in *Coat Corporation of America* v. *United States,* No. 48250, decided July 15, 1952, and with the result in *MacDonald* v. *United States,* 113 C. Cls. 300, certiorari denied, 339 U. S. 911, the majority of the court below has held that the First War Powers Act and Executive Order 9001, without more, confer authority to amend contracts without consideration "upon contracting officers as such, and not upon any specifically designated office or officer, although, of course, a

subordinate who acted might be accountable to his superior as a matter of departmental administration" (R. 70). The decision is, we submit, clearly erroneous. In plain language, the First War Powers Act and Executive Order 9001 (*infra*, pp. 19, 21-23) confer authority to make and amend contracts without regard to the usual provisions of law solely upon the head of the department and those to whom he may delegate his powers. Although War Department Procurement Regulations give power to contracting officers to enter into contracts, those Regulations expressly withhold the authority to modify such contracts without consideration (*infra*, pp. 11-12). And insofar as it holds that a purported exercise of this withheld power binds the Government if it is within the apparent scope of the contracting officer's authority and that the contracting officer is merely "accountable to his superior as a matter of departmental administration" if he violates specific limitations on his authority (R. 70), the decision below is contrary to this Court's pronouncement in *Whiteside* v. *United States*, 93 U. S. 247, 257, that "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public."

Since many past and all present Government war and defense contracts are subject to the provisions of the First War Powers Act (see *infra*, pp. 16-17), it is of far-reaching importance that the conflict between the court below and the Court of Claims be resolved. To hold that all contracting officers are empowered to release accrued obligations due the the United States, and to amend or modify contracts regardless of the ordinarily applicable provisions of law, is to invite on a large scale the abuses which are intended to be prevented by the general principle that the Government is neither bound nor estopped by the unauthorized acts of its agents. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 384; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 294; *Whiteside* v. *United States, Supra.*

1. Putting the First War Powers Act and Executive Order 9001 to one side, the supplemental agreement reducing the contract rate payable to the United States would unquestionably be void for lack of consideration. Cf. *Coat Corporation of America* v. *United States*, Court of Claims No. 48250, July 15, 1952; *MacDonald* v. *United States*, 113 C. Cls. 300, 314-315, certiorari denied, 339 U.S. 911; *Bausch & Lomb Optical Co.* v. *United States*, 78 C. Cls. 584, 606-607, certiorari denied, 292 U.S. 645; *Yale & Towne Mfg. Co.* v. *United States*, 67 C. Cls. 618, 625; see also *United States* v. *Bostwick*, 94 U.S. 53, 67. Admittedly, the First War Powers Act and Executive Order 9001 do authorize the modification of contracts without con-

sideration and the consequent relinquishment of rights of the United States, but it is clear that such sweeping authority was never delegated to contracting officers generally or to the contracting officer in this case. Because there was no such delegation, the supplemental agreement was not binding upon the United States, *Federal Crop Ins. Corp.* v. *Merrill, supra; Royal Indemnity Co.* v. *United States, supra; Whiteside* v. *United States, Supra.*

(a) By its terms, the Act confers authority solely upon the President, who is empowered to "authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort * * * to enter into contracts and into amendments or modifications" thereof "without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war."[1] In the absence of any delegation by the President, it is indisputable that no subordinate officer would be empowered to exercise any of the authority created by the Act.

Similarly, there can be no doubt that the Executive Order does not, in itself, confer any authority upon contracting officers as such. Even the most casual reading of the Order discloses that the President did not indiscriminately delegate his

[1] The plain intent of this language is fully corroborated by the Act's legislative history. See 87 Cong. Rec. 9838-9843, 9856, 9858-9860, 9863-9865; H. Rept. No. 1507, 77th Cong., 1st Sess., pp. 1, 2; S. Rept. No. 911, 77th Cong., 1st Sess., p. 1.

powers. To begin with, the President did not authorize all agencies "exercising functions in connection with the prosecution of the war effort" to employ those war powers. Executive Order 9001 was confined to the War and Navy Departments and the Maritime Commission. It remained for subsequent Executive Orders to extend that authority to other named departments and agencies (see 50 U.S.C. App. (1946 ed.) pp. 5730-5733). Furthermore, the President did not delegate those war powers broadly and impersonally to the agencies and departments as such. On the contrary, Executive Order 9001 explicitly provides that "the authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised" through any other official of the respective departments, and the heads of those departments may confer upon any official "the power to make further delegations" (Title I, par. 1).[2] Thus, insofar as is here pertinent, the Executive Order is on its face a grant of authority, not to contracting officers as such, but solely to the Secretary of War and to his delegees in his "discretion" and by his "direction." Accordingly, the court below manifestly

[2] In conformity with this delegation in Executive Order 9001 to the heads of the three designated departments and their delegees, the later Executive Orders extending the provisions of Executive Order 9001 to other named departments and agencies similarly conferred powers upon the heads of those agencies and not upon the agencies impersonally (see 50 U.S.C. App. (1946 ed.) pp. 5730-5733).

erred in holding that, as a matter of law, the First War Powers Act and Executive Order 9001, in themselves and without more, authorized the contracting officer here to amend the contract without consideration.

(b) The authority found by the court below to relinquish the Government's rights was not only not delegated to contracting officers, but was expressly withheld from them. Pursuant to the provisions of the Executive Order, the Secretary of War delegated his authority to the Under Secretary of War (7 F.R. 9268, 10 CFR 1944 Supp. p. 661), who redelegated his authority to the Commanding General, Services of Supply (7 F.R. 9269, 10 CFR 1944 Supp. pp. 663-664), who, in turn, redelegated his authority to the Director, Purchases Division, Services of Supply (7 F.R. 9270, 10 CFR 1944 Supp. pp. 665-666). No further delegations were made with respect to the authority to amend or modify contracts without consideration. To the contrary, the Procurement Regulations of the War Department explicitly provided that "approval by the Director, Purchases Division, Headquarters, Army Service Forces, will be required for each supplemental agreement or change order which does not involve the receipt by the Government of adequate legal consideration, or which modifies or releases an accrued obligation owing directly or indirectly to the Government." Par. 308a, 8 F.R. 16009, 10 CFR 1943

Supp., 81.308a.[3] Thus, even if the unusual powers conferred by the Act and the Executive Order could have been supposed to be within the apparent scope of the authority of contracting officers, the specific limitations upon their authority laid down by the War Department Procurement Regulations would invalidate the supplemental agreement here in issue. Cf. *Whiteside* v. *United States, supra,* at 257; *Federal Crop Ins. Corp.* v. *Merrill, supra.*[4]

(c) The court below erred when it found the standard form "disputes" clause in the contract

[3] The affidavit of the contracting officer attached to respondents' motion for summary judgment recites that the supplemental agreement was "entered into pursuant to and by virtue of his authority as Commanding Officer of the [prisoner of war] Camp, and contracting officer for the United States." (R. 60-61.) It does not refer to any memorandum, regulation, letter, order, or other writing which delegated to him any authority under the Act and the Executive Order, and respondents point to none. Indeed, a letter order from the Adjutant General of the Army to the Commanding Generals, First to Ninth Service Commands, dated November 16, 1943, demonstrates that no such writing exists. See Appendix B, *infra*, pp. 24-29. This letter which, although it is not contained in the record, was called to the attention of the district court and set forth in brief and argument without objection in the court below, sets forth the procedure to be followed in the making of inefficiency allowances and affirms that the approval of the Director, Purchases Division, Army Service Forces, was necessary for such contract modifications.

There is no suggestion of a finding below that the contracting officer had in fact received a delegation to exercise the authority in question here. Instead, the courts below merely found that, apart from any such delegation and even despite specific orders to the contrary, the First War Powers Act and the Executive Order empowered the contracting officer, as a matter of law, to amend the contract without consideration.

[4] Since the opinion below states that "we have been cited to no adequate authority to the contrary, nor to any limitation in the statute or Executive Order which proscribes such action" (R. 71), it should be noted that these procurement Regulations were expressly called to the court's attention.

(*infra*, p. 24) a source of authority for the contracting officer to amend the contract without consideration (R. 70). It is manifest from the long and frequently litigated history of that clause—which authorizes the contracting officer, not to modify the contract, but merely to decide "all disputes concerning questions of fact which may arise *under this contract*" (emphasis added)—that it has no reference whatsoever to the First War Powers Act or to the extraordinary powers that Act creates. Repeatedly considered by this Court (see, *e. g.*, *United States* v. *Callahan Walker Constr. Co.*, 317 U. S. 56; *United States* v. *Wunderlich*, 342 U. S. 98), the disputes provision was a standard feature of Government contracts long prior to the passage of the Act. See U. S. Standard Form No. 23, 41 U. S. C. A. App. § 54.13, Article 15; U. S. Standard Form No. 32, 41 U. S. C. A. App. § 54.21, Article 12. It is clear, therefore, that this clause, the plain language of which dispels the unprecedented suggestion that it authorizes contract modifications without consideration, never functioned as a delegation of authority under the First War Powers Act. On the contrary, as we have noted, the delegations permitted by the Act were made expressly and in detail in comprehensive regulations in no way related to, or affected by, the disputes provision, which is specifically provided for elsewhere in the regulations. Par. 326, 10 CFR 1944 Supp., 803.326. And the regulations under the Act unambiguously negative the conclusion of the court below by directing that the "ap-

proval by the Director, Purchases Division, Army Service Forces, will be required for each supplemental agreement or change order which does not involve the receipt by the Government of adequate legal consideration." 10 CFR 1943 Supp., 81.308a.[5]

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[5] The cases cited by the court below are wholly inapposite. *United States* v. *Koplin*, 24 F. 2d 840 (N. D. Ga.), and *United States* v. *West Point Grocery Co.*, 30 F. 2d 941 (N. D. Ga.) hold that the Secretary of War, in disposing of surplus property, was authorized, through the officers to whom he had delegated his authority, to make an adjustment in a contract which could not be carried out because of a reasonable dispute as to its existence and terms. Unlike the instant case, there was consideration to validate the settlement, and the Secretary had delegated the power to make the compromise to the subordinate officials concerned. *United States* v. *Corliss Steam Engine Co.*, 91 U. S. 321, stands only for the proposition that the head of a department who has ordered the termination of a contract is authorized to enter into a settlement providing for compensation for partial performance of the contract. In *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *James Graham Co.* v. *United States*, 91 F. Supp. 715 (N. D. Cal.); and *Mathis* v. *United States*, 79 F. Supp. 703 (D. N. J.), the disputes concerned the items of expenditure allowable as reimbursable costs under cost-plus-fixed-fee contracts, and the contracts specifically provided for determination by the contracting officer of those questions of fact. The issue raised in those cases was not whether authority to make those determinations had been delegated to the contracting officer, but whether such a delegation could lawfully be made in derogation of the authority of the Comptroller General.

More akin to the present case is *United States* v. *American Sales Corp.*, 27 F. 2d. 389 (S. D. Tex.), affirmed, 32 F. 2d 141 (C. A. 5), certiorari denied, 280 U. S. 574. The question there, as here, was whether the United States was bound by a supplemental agreement reducing the contract price payable to the United States. The United States had contracted to sell 7,700 wagons to the American Sales Corporation at $55.25 each. After 571 wagons had been delivered, the Corporation obtained a new contract reducing the price of the wagons to $30.25. The Corporation was held liable for the price originally stipulated, the court below pointing out that "Authority to make the original contracts does not imply authority to cancel them or to relinquish rights thereby acquired." 32 F. 2d at 142.

2. The decision below conflicts with the express holding in *Coat Corporation of America* v. *United States*, C. Cls. No. 48250, decided July 15, 1952, and with the result in *MacDonald* v. *United States*, 113 C. Cls. 300, certiorari denied, 339 U. S. 911. Plaintiff in the *Coat Corporation* case had contracted under the authority of the First War Powers Act, with the Army Quartermaster Corps to deliver 7,500 raincoats at the unit price of $5.50. The contract, which contained the standard form disputes clause, provided that the price could be revised on the basis of actual cost experience after a 30 per cent trial run, and further provided for termination in the event of delays in deliveries. After some 2,000 raincoats, or 28 per cent of the total quantity contracted for, had been delivered, the contract was duly terminated because of delays in deliveries. Subsequently, the contracting officer entered into a supplemental contract revising the unit price of the delivered coats from $5.50 to $9.15, and plaintiff sued for the higher price. There, as in the present case, the questions before the court were whether the supplemental contract was supported by consideration and whether the contracting officer had authority under the First War Powers Act to modify the contract without consideration. The Court of Claims denied recovery, ruling against the plaintiff on both issues. The court held, first, that plaintiff was not entitled to the revision of the contract price since the contract was terminated because of the plaintiff's default before delivery of 30 per cent of the coats. For

that reason the supplemental contract was void for want of consideration. With respect to the First War Powers Act, the court held that the contracting officer lacked authority under the Act because the War Department Procurement Regulations specifically withhold such authority from contracting officers. This conclusion, which we believe to be clearly correct, is directly contrary to the decision below.[6]

3. The problems presented, particularly the construction of the First War Powers Act, are of continuing general importance. Twice extended since the beginning of hostilities in Korea, to its current expiration date on June 30, 1953 (64 Stat. 1257; 66 Stat. 295), Title II of the First War Powers Act will presumably be further extended hereafter during the present national emergency. By Executive Order 10210, February 2, 1951, 16 F. R. 1049, the President once again delegated to the Department of Defense authority under the Act "to enter into contracts * * * or modifications of contracts

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[6] In *MacDonald* v. *United States*, *supra*, a contracting officer agreed to pay a contractor an amount greater than the contract price to compensate for costs of performance higher than the contractor had anticipated. In a suit by the contractor following disallowance of the additional payment by the contracting officer's superior, the Court of Claims ruled that the promise of an increase had lacked consideration and was therefore unenforceable. Although the contractor's brief urged that the necessity for consideration had been eliminated by the First War Powers Act and Executive Order 9001, the court ignored this contention in its opinion. In its petition for a writ of certiorari, the contractor advanced the same argument; in reply the Government argued, as it has in the instant case, that there had been no delegation of authority under the Act to the contracting officer.

* * * without regard to the provisions of law relating to the making, performance, amendment or modification of contracts." As before, the Executive Order further authorized the Secretaries of Defense, the Army, the Navy and the Air Force "in their discretion and by their direction [to] delegate such authority to any other military or civilian officers or officials of their respective departments." And once again, the authority to amend contracts without consideration has been expressly withheld from contracting officers by the pertinent Procurement Regulations. See Joint Regulations of the Armed Forces, Par. 438.4, 16 F.R. 2623, 2624; Army Procurement Regulations, Pars. 590.900 to 590.906-3, 16 F.R. 7652-7654. It is of obvious importance in administering the current defense program and in litigation arising under defense contracts to know whether, despite the explicit language of the Executive Order and the Procurement Regulations, contracting officers will nevertheless be deemed authorized to amend or modify contracts without consideration.

In addition, the decision below causes further confusion in the vexing area of finality of administrative decisions under government contracts. While we have repeatedly insisted that a contractual provision calling for finality must be given effect, we think it no less important that the standard form "disputes" clause not be held applicable where it has no relevance. Cf. *United States* v. *Bell Aircraft Corp.*, No. 13, this Term, certiorari granted, 343 U.S. 913.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

September ~~August~~, 1952.

APPENDIX A

1. Title II, Section 201, of the First War Powers Act (Act of December 18, 1941, 55 Stat. 838, 839, 50 U.S.C. App. 611) provides as follows:

> The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war: *Provided,* That nothing herein shall be construed to authorize the use of the cost-plus-a-percentage-of-cost system of contracting: *Provided further,* That nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits: *Provided further,* That all acts under the authority of this section shall be made a matter of public record under regulations prescribed by the President and when deemed by him not to be incompatible with the public interest.

2. P. L. 921, 81st Cong., 2d Sess., 64 Stat. 1257, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of*

America in Congress assembled, That section 201 of the First War Powers Act, 1941 (55 Stat. 838) is hereby amended by striking out the words "the prosecution of the war effort" and the words "the prosecution of the war", appearing in such section, and inserting in lieu of each stricken provision the words "the national defense"; and such section 201 is further amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: *"Provided further,* That all contracts entered into, amended, or modified pursuant to authority contained in this section shall include a clause to the effect that the Comptroller General of the United States or any of his duly authorized representatives shall have access to and the right to examine any pertinent books, documents, papers, and records of the contractor or any of his subcontractors engaged in the performance of and involving transactions related to such contracts or subcontracts."

SEC. 2. Title II of such Act, as amended, shall remain in force during the national emergency proclaimed by the President December 16, 1950, or until such earlier time as the Congress by concurrent resolution or the President may designate, but in no event beyond June 30, 1952.

SEC. 3. Nothing in this Act shall prejudice anything heretofore done under the said title II of the First War Powers Act, 1941, or the continuance in force of any action heretofore taken thereunder.

3. P. L. 426, 82nd Cong., 2d Sess., 66 Stat. 295, provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 2 of the Act of January 12, 1951 (64 Stat. 1257), is hereby amended by striking out "1952" and inserting in lieu thereof "1953".

4. Executive Order No. 9001, December 27, 1941 (6 F. R. 6787) provides in pertinent part as follows:

EXECUTIVE ORDER

AUTHORIZING THE WAR DEPARTMENT, THE NAVY DEPARTMENT, AND THE UNITED STATES MARITIME COMMISSION TO PERFORM THE FUNCTIONS AND EXERCISE THE POWERS DESCRIBED IN TITLE II OF AN ACT APPROVED DECEMBER 18, 1941, ENTITLED "AN ACT TO EXPEDITE THE PROSECUTION OF THE WAR EFFORT", AND PRESCRIBING REGULATIONS FOR THE EXERCISE OF SUCH FUNCTIONS AND POWERS

* * * * *

TITLE I

1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act to expedite the prosecution of the War effort", approved December 18, 1941, (hereinafter called "the Act") and as President of the United States and Commander-In-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized

within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof,

including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machinery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any per centum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof.

* * * * *

FRANKLIN D. ROOSEVELT.

5. Section 11 of the contract reads as follows (R. 18):

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail a copy thereof to the Contractor. Within 30 days from said mailing the Contractor may appeal to the Commanding General of the Service Command, whose decision or that of his designated representative, representatives, or board shall be final and conclusive upon the parties hereto. Pending decision of a dispute hereunder the Contractor shall diligently proceed with the performance of this contract.

APPENDIX B

WAR DEPARTMENT

Washington 25, D. C.

16 November 1943

AG 383.6 (23 Sep 43)
OB-P-A-MB-A

SUBJECT: Prisoner of War Labor.

To: Commanding Generals, First to Ninth Service Commands.

1. Reference is made to letter, AG 383.6 (23 Aug

43) OB-S-AM, 24 August 1943, subject, "Employment of Prisoners of War off Reservation."

2. According to instructions contained in that letter, the price to be paid by the employer contracting for prisoner of war labor will be equivalent to the cost of the job if done by free labor at wages prevailing in the locality for similar work. The contract may provide for payment by the employer on a piece-work, job, man-hour, or man-day basis.

3. Prisoner of war labor may in particular cases be measurably less efficient than free labor. This will not work any material hardship on the employer where the contract provides for payment on a piece-work or job basis, since the employer will be paying only for units actually produced. Where, however, the contract provides for payment on a man-hour or man-day basis, serious hardship to the employer may result if the prisoner of war labor is measurably less efficient than free labor.

4. In order to avert or alleviate such hardship the policies and procedure set forth below will be observed.

5. Wherever practical, contracts for employment of prisoner of war labor will provide for payment on a piece-work or job basis rather than on a man-hour or man-day basis.

6. Where a contract for employment of prisoner of war labor provides for payment on a man-day or man-hour basis, and the prisoner of war labor is in fact measurably less efficient than free labor, with resultant serious hardship on the employer, relief may be granted to the employer by means of

an adjustment of the contract price pursuant to War Department Procurement Regulations, paragraph 308-A. Relief will be granted only in clearly meritorious cases where facts exist justifying the finding that the prosecution of the war will be facilitated thereby.

7. Applications for such relief will be processed as follows:

a. The employer's application for an adjustment of the contract price will be in writing, addressed to the Commanding Officer of the prisoner of war camp, and will set forth the amount of the reduction in the contract price requested. The application will be presented at the earliest feasible time, and in all cases before performance of the contract is completed and before final payment is made thereunder.

b. The commanding officer of the prisoner of war camp will forward the application together with a statement of the facts, a copy of the contract involved, and his recommendation, to the commanding general of the service command. He will note in the statement of facts the amount of the funds which are then, and which will at the completion of the contract be held by the finance officer in the special deposit fund (See Par. 9).

c. The commanding general of the service command will promptly deny the application if he believes it is not meritorious. Otherwise he will transmit the file together with such further data as he may consider necessary to the regional manpower director.

d. The regional manpower director will examine into the facts and return the file to the commanding

general of the service command with his recommendation.

e. The commanding general of the service command, in cases where he believes that the application should be granted, will forward the file (including the recommendation of the regional manpower director), together with his finding and recommendation, to the Director, Purchases Division, Headquarters, Army Service Forces, *through* the Provost Marshal General, for consideration and disposition of the application under War Department Procurement Regulations, paragraph 308-A.

f. The file will be returned through channels to the Commanding officer of the prisoner of war camp. If favorable action has been taken upon the application by the Director, Purchases Division, the commanding officer of the prisoner of war camp will cause an appropriate supplemental agreement to be prepared and executed by the parties, evidencing the adjustment of the contract price. Such supplemental agreement will refer specifically to the action taken by the Director, Purchases Division, under War Department Procurement Regulations, paragraph 308-A. (Specimen form of supplemental agreement is attached, Inclosure 1.)

8. On and after the date when the commanding officer of a prisoner of war camp first has reason to believe that the man-hour or man-day rate specified in a contract is inequitably high or that an application for adjustment will probably be made by the employer, and in no event later than the date of receipt of an application for adjustment, he will transmit all checks or money orders received from the employer in payment under the contract to the finance officer, listing such remit-

tances on Standard Form 1044 and showing the fund to be credited as "Special Deposit Fund—Pending Further Instructions." If no application for adjustment is filed, or if such application is filed and denied, the commanding officer of the prisoner of war camp will prepare and transmit to the finance officer Standard Form 1046, listing all remittances to be transferred from the special deposit fund to the regular account and showing the fund to be credited as Miscellaneous Receipts ("215237—Services of Civilian Internees and Prisoners of War"). If the application for adjustment is granted and a supplemental agreement evidencing the adjustment is executed, the commanding officer of the prisoner of war camp will prepare and certify on Standard Form 1049 the amount due for refund to the employer in accordance with the agreement and will prepare Standard Form 1046 for the balance due for deposit in the Treasury as Miscellaneous Receipts (if the entire amount of the special deposits is not to be refunded to the employer) and will transmit the forms to the finance officer for his action. (The forms above mentioned will be prepared in sufficient quantity to provide copies in triplicate for the finance officer and retained copies for the files of the commanding officer.) In no case will the amount of the allowed adjustment exceed the amount held in the special deposit fund in connection with the particular contract.

9. The Secretary of War has found and determined that the foregoing procedure, and the adjustment of contracts in appropriate cases in conformity with that procedure, will facilitate the prosecution of the war.

10. The table "Distribution" on the facing page of the contract now in use (incl. 3 of letter, AG 383.6 (23 Aug 43) OB-S-A-M, 24 August 1943, subject, "Employment of Prisoners of War off Reservations") is no longer in accord with procurement regulations, and should be changed so as to be the same as the table appearing on the face of the attached form of supplemental agreement.

By order of the Secretary of War:

(S.) J. A. ULIO,
Major General,
The Adjutant General.

1 Incl.
Supplemental agreement.

Copies furnished:
Divisions of the War Department General Staff
Commanding Generals:
Army Ground Forces
Army Air Forces
Army Service Forces
Eastern, Central, Southern and Western Defense Commands
The Provost Marshal General
Deputy Chief of Staff for Service Commands
Chiefs of Technical Services

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FILE
SEP 26
CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1952

No. 315

UNITED STATES OF AMERICA
Petitioner

vs.

ADAMS PACKING ASSOCIATION, Inc., et al
Respondents

BRIEF OF THE RESPONDENTS

In Opposition to Petition for Certiorari

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THE TRIBUNE PRESS, TAMPA, FLA.

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IN THE

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No. 315

UNITED STATES OF AMERICA,
Petitioner

vs.

ADAMS PACKING ASSOCIATION, Inc., et al
Respondents

BRIEF OF THE RESPONDENTS

In Opposition to Petition for Certiorari

STATEMENT OF THE CASE

The contract upon which petitioner sues was executed for the United States by Lt. Grafft, commanding officer of the prison of war camp and contracting officer (R-10, 11 & 19), and was authorized and negotiated under the First War Powers Act and Executive Order No. 9001 (R-12 and Petition, page 3). The petitioner is seeking to recover the difference between the prevailing price for labor and the reduced price allowed because of the inefficiency of the prison labor furnished.

The facts, as shown by the affidavits of C. C. Street, R. C. Lewis and Lt. Grafft, petitioner's contracing officer, filed in support of respondent's motion for summary judgment, are uncontrovered (R-53, 57 & 60). Petitioner offered nothing to counter these facts.

About the time the contract was being negotiated it was recognized by the members of the Association and Lt. Grafft, contracting officer and commanding officer of the prisoner of war camp, that the prisoners of war to be furnished by petitioner were inefficient in their work, and, therefore, a lesser pay rate than that prevailing would be justified. Several meetings were held between members of the Association and Lt. Grafft, and other government officials, discussing and negotiating the percentage to be allowed as a deduction for inefficiency from the prevailing wage rate. After a thorough investigation by government officers it was agreed between Lt. Grafft and members of the Association that twenty-five per cent deduction would be allowed (R. 53-61).

In accordance with the agreement the members of the Association were charged and periodically billed at the rate of 37½ cents per man hour from April 4, 1944, to June 15, 1944, for prison labor furnished to them by petitioner, this rate representing 25 per cent reduction. These charges were paid (R. 53-61).

Approximately two years after this transaction the General Accounting Department of the Office of the Comptroller General took issue and called upon the members of the Association to pay the difference (R. 12 & 44).

The effect of the summary judgment entered by the District Court and affirmed by the Court of Appeals is that Lt. Grafft was acting within his authority in allowing the inefficiency reduction.

ARGUMENT

The questions presented for determination by petitioner are misleading. The basic question is whether or not petitioner's contracting officer had authority to allow the inefficiency reduction, whether it be by virtue of the First War Powers Act and Executive Order 9001, the original contract itself, or otherwise.

It is important to note that petitioner offered nothing in opposition to respondents' motion for summary judgment to show that Lt. Grafft had no express authority to allow this reduction. To the contrary, the facts disclose that it was only after several meetings and discussions between Lt. Grafft and other government officials and respondents, and after an investigation by government officials, that the reduction was allowed. Lt. Grafft did not take it upon himself to allow for inefficiency as petitioner would have the Court believe. Lt. Grafft states that he entered the supplemental agreement under his authority as commanding officer and as contracting officer for the United States (R. 53-61).

The record is devoid of facts that would show that Lt. Grafft's superiors, or the department whom he repsented, rejected or disputed his supplemental agreement. It was not until the matter came into the hands of a separate and distinct agency of the United States, the General Accounting Department of the Office of the Comptroller General, that this suit was instituted.

Thus, it is seen that the petition ignores these facts and is based upon the bold supposition that Lt. Grafft had no express authority to allow the reduction, a supposition having no support from the record.

The petitioner contends that the broad powers delegated by the First War Powers Act and Executive Order 9001 was never conferred upon Lt. Grafft, the contracting officer. Yet the contract, which is the basis of Petitioner's suit, was entered into pursuant to, and was authorized by and negotiated under, the provisions of the First War Powers Act *(55 Stat. 838, 839, 50 U. S. C. App. 611)*, and Executive Order No. 9001 *(6 F. R. 6787)*. This petitioner cannot dispute for it alleged in its complaint:

> "Said contract was authorized by and negotiated under Act of Congress designated as Public No. 354, 77th Congress, and Executive Order No. 9001." (R. 12).

Again this authority was admitted in the petition on page 3.

The Act and Executive Order were emergency measures, enacted and issued to facilitate the prosecution of the war and to expedite the making of Government contracts.

Section 1 of the Act provides that the President, in order for a more effective exercise and more efficient administration of his powers, is authorized to make a redistribution of functions as he deems necessary.

Under Title II; Section 201, of the same law the President was empowered to authorize any department or agency "to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments theron, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts."

Pursuant to this Act the President issued Executive Order No. 9001. This Order authorized the War Department, Navy Department and U. S. Maritime Commission to enter into contracts, and into amendments and modifications thereof, and to make advance, progress, and other payments thereon, without regard to the law relating to the same. Also, it provided that the contracts authorized to be made included agreements of all kinds without restriction of any kind, either as to type, character, location or form. Further, it stated that the departments named could modify or amend or settle claims under contracts and could modify or release accrued obligations of any sort, and that amendments or modifications could be *with or without consideration.* This Order expressly provided that the authority conferred therein could be exercised by the various departments or in their discretion and by their direction could also be exercised *by any officer,* officers or civilian officials thereof.

In the face of this broad delegation of authority conferred by the President and in the face of the admitted authority of Lt. Grafft by virtue of said delegation to enter into the contract in Petitioner's behalf, the Petitioner now disclaims the authority of their agent, Lt. Grafft.

Certainly, since Lt. Grafft negotiated and entered into the original contract on behalf of Petitioner by virtue of said Act and Executive Order, there had to be a delegation of this authority to him.

How can the Government in one breath adopt the action of an agent and in the other disclaim such? If this be true, the Government could at any time accept that part of a contract most favorable but reject that part unfavorable, and no settlement would bind the Government.

Furthermore, this written contract, admitted to exist by virtue of the Act and Executive Order, clearly shows the authority conferred upon the contracting officer, Lt. Grafft. Section 11 of that contract provides that all disputes of fact *"which are not disposed of by mutual agreement, shall be decided by the contracting officer."* (R. 9 & 18). This gave to the contracting officer full authority to settle disputes whose decision was final unless appealed within the time allowed. In the present case the dispute was settled by mutual agreement. There is no provision making the officer's decision contingent upon the approval by the Government.

Petitioner argues that since this standard disputes clause existed in Government contracts prior to the enactment of the War Powers Act it had no reference to the Act. However, it is axiomatic that all contracts, even those of the United States, are to be construed in the light of the applicable law at the time of the making, and such law becomes a part thereof. Here, at the time of the execution of the original contract the First War Powers Act and Executive Order 9001 were in existence. Since it is admitted that the contract was entered into pursuant to the Act and Executive Order, this dispute clause, as well as other provisions, clearly shows that Lt. Grafft's authority extended to more than merely taking his pen in hand and signing his name.

It is a well settled rule of this Court that a decision by the contracting officer made under such a provision is final and conclusive and can only be set aside for fraud. See *United States v. Wunderlich (1951) 342 U. S. 98.*

It is equally well settled that the powers of the Comptroller General are extensive and broad, but he does not in the absence of fraud or overreaching have

authority to determine the propriety of contract payments when the contracts themselves vest final power of determination in the contracting officer. See *United States v. Mason & Hanger Co., 260 U. S. 323; United States v. Moorman, 338 U. S. 457; Long v. United States 102 F. Supp. 134; Leeds & Northrup Co. v. United States, 101 F. Supp. 999; Consolidated Vultee Aircraft Corp. v. United States, 97 F. Supp. 948; James Graham Mfg. Co. v. United States, 91 F. Supp. 715; and Mathis v. United States, 79 F. Supp. 703.*

Next, Petitioner attempts to invoke the Court's jurisdiction because of an alleged conflict between the ruling in the present case and that of the Court of Claims in *Coat Corporation of America v. United States, C. Cls.* decided July 15, 1952, and in *MacDonald v. United States, 113 C. Cls. 300.* Although we do not believe such a conflict, if it existed, would be substantial enough to justify the Court in granting certiorari, a close analysis of these cases dispels any conclusion of conflict.

In the *Coat Corporation of America case,* supra, the contract provided for termination in the event of delays in delivery, and the contract was terminated because of delay. The attempted revision was subsequent to the termination and revised prices on goods already delivered. Any authority the contracting officer held by virtue of the contract ended with its termination.

In the case at hand the original contract entered into by the contracting officer pursuant to the First War Powers Act and Executive Order 9001 was existing and not in default at the time of the modification. Here the price was revised not on deliveries previously made but on future deliveries because of the acknowledged inefficiency of the work performed by war prisoners.

The question was never decided in the *MacDonald case, supra,* and therefore, it creates no conflict nor is it authority for the case at bar.

Regardless of the First War Powers Act and Executive Order 9001, the holdings of this Court in *United States v. Corliss Steam Engine Co., 91 U. S. 321; United States v. Mason & Hanger Co., 260 U. S. 323; Maryland Steel v. United States, 235 U. S., 451;* and *Solomon v. United States, 19 Wall. 17,* provide ample authority to sustain the lower Court's rulings.

In *United States v. Corliss Steam Engine Co. supra,* the Navy Department, on recommendation of a board of officers suspended work under a contract with claimant. The claimant made a proposed settlement which was accepted by the Navy Department. As to the authority of the Navy to make such a settlement it was said:

> "If such a settlement, as the Chief Justice of the Court of Claims very justly observes, accompanied by the giving up by one, and the taking possession by the other of the property involved, cannot be Judicially maintained, it would seem that no settlement by any contractor with the Government could be considered a finality against the Government.
>
> When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation or fraud, it must be equally binding upon the Government as upon the contractor; at least, such a settlement cannot be disregarded by the Government without restoring to the contractor the property surrendered as a condition of its execution."

Maryland Steel v. United States, supra. Plaintiff sued for balance due on contract with Government for construction of a vessel. The contract had a time limit

for completion and provided a penalty of so much a day if not completed in time. The Quartermaster General agreed to extend this time. The Government claimed that he had no such authority and set up the penalty by way of set-off. It was held that Quartermaster had authority:

> "The case at bar is a case of contract authorized by law necessarily entered into and conducted by the officers of the government, and as necessarily they must have had the power to make it effective in its beginning and progress. The court of claims recognized this and found that the Quartermaster General, United States Army, within his discretion under the contract orally waived the time limit in said contract."

In *United States v. Mason & Hanger Co., supra,* the plaintiff sued the United States for recovery of an amount paid for a bond alleged to be due under a cost plus contract for construction of a building and which amount the contracting officer had allowed. Article 4 of the contract provided that upon a disagreement the decision of the contracting officer shall govern. The Court said:

> "The officer in a sense, is a party to the contract, not only representing but speaking for the impersonality of the government. Competent, therefore, it would seem, to declare the meaning of the contract."
>
> "We have decided that the parties to the contract can so provide, and that the decision of the officer is conclusive upon the parties (citation omitted). *This is extending the rule between private parties to the government.*
>
> "There were such decisions, and settlement and payments in consequence of them, as we have seen. *Over the effect of these the Comptroller of the*

Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity and were, therefore, conclusive in effect."

In *Solomon v. United States, supra,* it was held that the *Act of 1862 1 Stat. at 411,* requiring contracts for military supplies to be in writing was not infringed by the officer in charge accepting delivery after the date stipulated in the contract nor was a verbal agreement to extend time of performance invalid.

In *United States v. Koplen, Same v. LaGrange Grocery Co., Same v. West Point Grocery Co., 23 F. 2d. 840, (D. C. Ga.)* an auction sale was held by the Governemnt for the disposition of surplus property under the direction of one Capt. Hern, Surplus Property Control Officer. Memoranda of the sales were made, signed by Capt. Hern and acknowledged by the purchasers. When the goods were delivered they were refused by the purchaser as not being those sold. Thereupon, the local Board cancelled the memoranda and issued others redescribing the property and fixing a lower price, which was paid by the purchaser. The Government brought suit to recover balances alleged to be due for the goods sold. The Government contended that the local Board had no authority to adjust the dispute. It was said:

"More specifically the Act of July 11, 1919 (5 USCA § 221), provided: 'The Secretary of War be, and he is hereby authorized to sell any surplus supplies . . . upon such terms as may be deemed best.' *This authority like many others whose exercise requires much detail, was necessarily to be exercised through agents."*

"I think the true line of the executive officer's powers of adjustment in matters which he is conducting must be drawn at what is really necessary

to enable him to carry to a conclusion the act which he has authority to perform. If his only authority is to conclude a contract, he cannot, after making it, revise it, or make another. If he has authority also to supervise its execution, he has a measure of discretion as to how to exact an execution he will require. The question is really one of a fair estimate of the power intended to be intrusted to him.

"Now in the present case the Secretary of War, through the officers to whom he had delegated the power, was authorized to sell the surplus property. This power was not executed by merely making contracts of sale, but extended to the full execution of the sale by delivering the property and collecting the price. If, after a contract for the sale of articles was made, the contract could not be carried out because of reasonable dispute as to its existence or terms, the congressional intent must have been that an adjustment or a new contract should be made; otherwise, it could not be said that a sale had been effected, and certainly the proceeds could not be covered into the Treasury. . . . Therefore the fact that the adjustment may amount to a new contract, or even take that form, as it did in this case, is not unlawful. If the agents of the Secretary determined that, because of mistake, inability or failurt to deliver goods as decribed, or other just reason, an attempted sale has failed, another one on other terms was appropriate. It was altogether desirable and necessary that such matters be settled at once and by the persons having knowledge of them, so that the property might be sold to others, if need be. These things are fairly included in the authority to sell the property."

We believe that the reasoning applied in the above case forms a just conclusion for the present controversy.

CONCLUSION

We respectfully submit that Lt. Grafft, the contracting officer, had ample authority to modify the contract to account for the failure of the efficiency of war labor furnished by petitioner to equal that of prevailing labor. The petition for certiorari should be denied.

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